IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, PETITIONER	:	OCTOBER TERM, 1982
V.	:	
ANDRE LOVETTE, AND SIMONA LOVETTE, REPRESENTATIVE OF THE ESTATE OF ANDRE LOVETTE, RESPONDENTS	:	NO.

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, ESQUIRE, COUNSEL FOR PETITIONER, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA TO BE SERVED UPON JOHN W. PACKEL, ESQUIRE, COUNSEL FOR RESPONDENTS, ANDRE LOVETTE AND SIMONA LOVETTE, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO JOHN W. PACKEL, ESQUIRE, DEFENDER ASSOCIATION OF PHILADELPHIA, 121 NORTH BROAD STREET, PHILADELPHIA, PENNSYLVANIA, 19107, ON THURSDAY, DECEMBER 2, 1982.

Eric B Henson

ERIC B. HENSON
DEPUTY DISTRICT ATTORNEY
LAW DIVISION
1300 CHESTNUT STREET
PHILADELPHIA, PENNA. 19107

SWORN TO AND SUBSCRIBED BEFORE ME THIS 2ND DAY OF DECEMBER, 1982, A.D.

Joyce M. Nichols

NOTARY PUBLIC

MY COMMISSION EXPIRES: 9/19/83

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497, JANUARY TERM, 1979
	:	
v.	:	
	:	(C.P. PHILADELPHIA, CRIMINAL SECTION No. 1673, DECEMBER TERM, 1976)
ANDRE LOVETTE, APPELLANT	:	

JUDGMENT

ON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED AND ADJUDGED BY THIS COURT THAT THE JUDGMENT OF THE COURT OF COMMON PLEAS, TRIAL DIVISION, CRIMINAL SECTION - PHILADELPHIA COUNTY, BE, AND THE SAME IS HEREBY REVERSED AND A NEW TRIAL AWARDED.

BY THE COURT:

/s/ MARLENE F. LACHMAN, ESQ.
PROTHONOTARY

DATED: OCTOBER 5, 1982

[J-122]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497 January Term, 1979
	:	
v.	:	Appeal from the Order of the Superior Court (October Term 1977, No. 2366) affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
ANDRE LOVETTE,	:	
Appellant	:	
	:	
	:	Argued: April 15, 1982

OPINION

NIX, J. Filed: October 5, 1982

In this appeal appellant seeks in the alternative discharge or the award of a new trial. In the first instance it is contended the evidence presented against appellant was insufficient as a matter of law to sustain the conviction. The alternative position, that at the very least the judgment of sentence must be vacated and a new trial awarded, is predicated upon the claims that the court erred in denying the suppression motion and the rejection of after-discovered evidence was improper. Although we do not accept appellant's assertion as to the insufficiency of the evidence, we do agree that he is entitled to a new trial because of an erroneous ruling on the suppression motion.(1)

On December 15, 1976 at 3:15 p.m. Officer James McCoy, a member of the Philadelphia Police Department, was dispatched to

(1) In view of our disposition, we need not consider the merits of the after-discovered evidence claim.

5115 Willows Avenue in response to an anonymous call to investigate "males with stolen property in a vacant house." Upon the arrival of officer McCoy and his partner at the designated premises, they found stereo equipment, wrapped Christmas gifts, clothing, pottery and other items. Their inspection of the scene revealed across the driveway at 748 South 51st Street a rear door was broken down and that the hinges had been broken off. Officer McCoy entered the home and found drawers ajar and items strewn over the floor. Approximately 10 minutes after the officers' arrival at the scene, Mr. Harold Bennett appeared and identified himself as the owner of 5115 Willows Avenue. He stated that he had left his home between 10:30 A.M. and 11:00 A.M. that morning at which time the property was secured and no one had been given permission to enter in his absence. The examination of the scene also disclosed trails of footprints in a muddy plot of ground between Mr. Bennett's home and the rear of the vacant premise. Mr. Bennett identified the goods found in the abandoned premise as being taken from his home.

Officer McCoy began to patrol the area at which time he observed three males a block and a half from the scene of the burglary. The men attracted his attention because of the mud on their shoes. Appellant, a member of the trio, had a brown paper bag in his hand. The officer approached the group and they made no effort to avoid the encounter. The officer asked for identification and the three men were unable to produce any. The officer asked appellant what was in the bag he was carrying and appellant immediately replied that it contained a hat. Appellant showed the hat to the officer, at the officer's request, and stated that he had received it from a friend. In response to a question

CONCERNING THE CONDITION OF HIS SHOES, APPELLANT STATED HE HAD PROBABLY WALKED THROUGH DIRT OR A FIELD.[2]

THE OFFICER DECIDED TO TRANSPORT THE GROUP TO THE HOME OF MR. BENNETT FOR A POSSIBLE IDENTIFICATION. BEFORE PLACING THE MEN IN THE POLICE VEHICLE, THE OFFICER CONDUCTED A "PAT DOWN" SEARCH WHICH PRODUCED FROM ONE OF APPELLANT'S COMPANIONS A RING AND A SILVER DIME OF NUMISMATIC VALUE. THE COMPLAINANT IDENTIFIED THE HAT, RING AND SILVER DIME AS BEING ITEMS TAKEN FROM HIS HOUSE. THE MEN WERE THEN PLACED UNDER ARREST AND CHARGED WITH BURLGARY AND THEFT BY UNLAWFUL TAKING.

AFTER A DENIAL OF THE PRE-TRIAL SUPPRESSION MOTION, APPELLANT WAIVED TRIAL BY JURY AND PROCEEDED TO TRIAL ON THE BASIS OF THE EVIDENCE ADMITTED AT THE SUPPRESSION PROCEEDING. THE DEFENDANT RESTED WITHOUT OFFERING A DEFENSE AND WAS FOUND GUILTY AS CHARGED. SUBSEQUENT TO THE DISPOSITION OF POST-VERDICT MOTIONS ADVERSE TO APPELLANT, A SENTENCE OF A TERM OF IMPRISONMENT OF FOUR TO TWENTY-THREE MONTHS WAS IMPOSED. THE CONVICTION WAS AFFIRMED BY THE SUPERIOR COURT SITTING EN BANC BY A FOUR TO TWO VOTE.[3] WE GRANTED REVIEW.

I. SUFFICIENCY OF THE EVIDENCE.

THIS CLAIM OF APPELLANT IS QUICKLY DISPOSED OF ON THE INSTANT RECORD. THE TEST FOR SUFFICIENCY OF THE EVIDENCE IS WHETHER ACCEPTING AS TRUE ALL OF THE EVIDENCE REVIEWED IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, TOGETHER WITH ALL REASONABLE INFERENCES

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(2) AT THE TIME THE GROUP WAS APPROACHED, THEY WERE STANDING NEAR AN AREA OF A CONCRETE AND DIRT VACANT LOT. IN THE GENERAL AREA THERE WERE MANY DIRT REAR YARDS.

(3) JUDGE SPAETH JOINED BY JUDGE HOFFMAN CONCLUDED THAT THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED AND THAT APPELLANT WAS ENTITLED TO A NEW TRIAL.

THEREFROM, THE TRIER OF FACT COULD HAVE FOUND THAT EACH ELEMENT OF THE OFFENSES CHARGED WAS SUPPORTED BY EVIDENCE AND INFERENCES SUFFICIENT IN LAW TO PROVE GUILT BEYOND A REASONABLE DOUBT. Commonwealth v. Ransome, 485 Pa. 490, 402 A.2d 1379 (1979); Commonwealth v. Sadusky, 484 Pa. 388, 399 A.2d 347 (1979) citing Commonwealth v. Sullivan, 472 Pa. 129, 149-150, 371 A.2d 463, 473 (1977). See also, Commonwealth v. Horton, 485 Pa. 115, 401 A.2d 320 (1979); Commonwealth v. Toney, 474 Pa. 243, 378 A.2d 310 (1977); Commonwealth v. Rose, 463 Pa. 264, 344 A.2d 324 (1975). Moreover, a claim of insufficiency of the evidence will not be assessed on a diminished record, but rather on the evidence actually presented to the finder of fact rendering the questioned verdict. Commonwealth v. Cohen, 439 Pa. 167, 413 A.2d 1066 (1980); Commonwealth v. Kuebler, 484 Pa. 358, 361 n.*, 399 A.2d 116, 117 n.* (1979); Commonwealth v. Tabb, 417 Pa. 13, 16, 207 A.2d 884, 886 (1965).

Here there is little question that the Commonwealth produced ample evidence for a finder of fact to conclude that the premises at 748 S. 51st Street had been burglarized and that there was a theft of its contents. Appellant does not challenge the proof of the fact of the burglary or the theft but rather focuses upon the evidence offered to establish his participation. Appellant characterizes the evidence in this regard as merely establishing "appellant's presence with two men, one of whom who [sic] possessed stolen property, not visible to appellant, which had been taken in the burglary committed sometime earlier that date, and appellant's possession of a hat which was similar to one taken in that burglary."

Appellant takes too narrow a view of the Commonwealth's evidence presented to establish his guilt. At trial Mr. Bennett

TESTIFIED [SIC] THE HAT AS HAVING BEEN TAKEN FROM A BUREAU DRAWER IN HIS DINING ROOM. THAT THE HAT MERELY RESEMBLED A HAT TAKEN FROM THE HOUSE DURING THE BURGLARY WAS AN INFERENCE THAT THE DEFENSE URGED THE FACT FINDER TO DRAW. HOWEVER, THE FACT FINDER WAS OBVIOUSLY FREE TO ACCEPT MR. BENNETT'S POSITIVE STATEMENT THAT THE HAT WAS IN FACT THE ONE REMOVED FROM THE HOUSE. THAT ONE OF APPELLANT'S COMPANIONS ALSO HAD ON HIS PERSON PROPERTY DEFINITELY IDENTIFIED AS BEING TAKEN DURING THE SAME BURGLARY PROVIDES A BASIS FOR FINDING THE TWO MEN AS BEING CO-PARTICIPANTS. IT UNQUESTIONABLY REFUTES THE DEFENSE'S CHARGE THAT THE EVIDENCE DID NOT ESTABLISH ANY RELATIONSHIP BETWEEN HIM AND THE OTHER TWO MALES HE WAS STANDING WITH WHEN APPROACHED BY OFFICER MCCOY. THE CONDITION OF THE SHOES OF THE TRIO WAS CONSISTENT WITH HAVING TRAVERSED THE AREA BETWEEN THE BURGLARIZED HOME AND THE VACANT PROPERTY.

THE FACT THAT THE EVIDENCE ESTABLISHING A DEFENDANT'S PARTICIPATION IN A CRIME IS CIRCUMSTANTIAL DOES NOT PRECLUDE A CONVICTION WHERE THE EVIDENCE COUPLED WITH THE REASONABLE INFERENCES DRAWN THEREFROM OVERCOMES THE PRESUMPTION OF INNOCENCE. COMMONWEALTH V. SULLIVAN, SUPRA; COMMONWEALTH V. FARQUHARSON, 467 PA. 50, 354 A.2D 545 (1976); COMMONWEALTH V. COX, 466 PA. 532, 353 A.2D 844 (1976); COMMONWEALTH V. PETRISKO, 442 PA. 575, 580, 275 A.2D 46, 49 (1971). SEE ALSO, COMMONWEALTH V. TINSLEY, 465 PA. 329, 350 A.2D 791 (1976); COMMONWEALTH V. MCINTYRE, 451 PA. 42, 47, 301 A.2D 832, 834 (1973). WE ARE SATISFIED THAT THE POSSESSION OF THE FRUITS OF THE BURGLARY FOUND ON THE APPELLANT AND HIS COMPANIONS WITHIN A BLOCK AND A HALF FROM THE SITUS OF THE CRIME, WITH HIS CLOTHING AND THAT OF HIS COMPANIONS IN A CONDITION COMPATIBLE WITH A RECENT VISIT TO THE SCENE OF THE CRIME, WITHIN A HALF AN HOUR OF THE DISCOVERY OF THE CRIME SUPPORTS A FINDING OF GUILT.

THUS THE SUFFICIENCY OF THE EVIDENCE CLAIM MAY PROPERLY BE DISMISSED AS BEING WITHOUT SUBSTANCE.

II. LEGALITY OF THE ARREST.

BOTH THE COMMONWEALTH AND THE MAJORITY OF THE SUPERIOR COURT AGREED THAT THE POLICE DID NOT HAVE PROBABLE CAUSE FOR THE ARREST OF APPELLANT AND HIS COMPANIONS UNTIL THE OWNER OF THE PREMISES IDENTIFIED THE HAT IN APPELLANT'S POSSESSION AND THE ITEMS TAKEN FROM HIS COMPANIONS AS HAVING BEEN TAKEN FROM THE BURGLARIZED PREMISES. IN THIS JURISDICTION IT IS CLEAR THAT ONE MAY NOT BE ARRESTED WITHOUT PROBABLE CAUSE. COMMONWEALTH V. BARTLETT, 486 PA. 396, 406 A.2D 340 (1979); COMMONWEALTH V. STOKES, 480 PA. 38, 389 A.2D 74 (1978); COMMONWEALTH V. DICKERSON, 468 PA. 599, 364 A.2D 677 (1976); COMMONWEALTH V. FARLEY, 463 PA. 487, 364 A.2D 299 (1976); COMMONWEALTH V. CULMER, 463 PA. 189, 344 A.2D 487 (1975); COMMONWEALTH V. JACKSON, 459 PA. 669, 331 A.2D 189 (1975); COMMONWEALTH V. RUSH, 459 PA. 23, 326 A.2D 340 (1974). WE HAVE DEFINED AN ARREST AS ANY ACT THAT INDICATES AN INTENTION TO TAKE THE PERSON INTO CUSTODY AND SUBJECTS HIM TO THE ACTUAL CONTROL AND WILL OF THE PERSON MAKING THE ARREST. COMMONWEALTH V. BOSURGI, 411 PA. 56, 190 A.2D 304 (1963). SEE ALSO, COMMONWEALTH V. NELSON, 488 PA. 148, 411 A.2D 740 (1980) CITING STEDING V. COMMONWEALTH, 480 PA. 485, 391 A.2D 989 (1978) AND COMMONWEALTH V. BROWN, 280 PA. SUPERIOR CT. 214, 326 A.2D 906 (1974); COMMONWEALTH V. SILO, 480 PA. 15, 389 A.2D 62 (1978), CERTIORARI DENIED SILO V. PENNSYLVANIA, 439 U.S. 1132, 99 S. CT. 1053, 59 L.ED.2D 94, REHEARING DENIED 440 U.S. 969, 99 S. CT. 1522, 59 L.ED.2D 785 (1979); COMMONWEALTH V. RICHARDS, 458 PA. 455, 327 A.2D 63 (1974).

THE QUESTION RAISED IS WHETHER PLACING APPELLANT IN A POLICE VEHICLE, AFTER A "PAT DOWN" SEARCH AND TRANSPORTING HIM TO THE SCENE OF THE BURGLARY CONSTITUTED AN ARREST. THERE IS NO DISPUTE THAT THE OFFICERS INTENDED TO EXERCISE CONTROL OVER APPELLANT AND HIS COMPANIONS AT LEAST UNTIL MR. BENNETT HAD AN OPPORTUNITY TO VIEW THE OBJECTS FOUND IN THEIR POSSESSION. THERE IS NO CONTENTION THAT APPELLANT VOLUNTARILY ACCOMPANIED THE OFFICER TO THE SCENE OF THE BURGLARY. SEE, E.G., COMMONWEALTH V. RICHARDS, SUPRA.

UNDER ALL OF THE CIRCUMSTANCES, IT IS CLEAR THAT THE PLACING OF APPELLANT AND HIS COMPANIONS IN THE POLICE VEHICLE FOR THE PURPOSE OF TRANSPORTING THEM TO THE SCENE OF THE OFFENSE, WITHOUT THEIR CONSENT, CONSTITUTED AN ARREST AS THAT TERM HAS BEEN DEFINED UNDER OUR CASES. IT IS EQUALLY TRUE THAT POLICE ACTION WAS A SEIZURE OF THE PERSON WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE FEDERAL CONSTITUTION. MICHIGAN V. SUMMERS, ___ U.S. ___, 69 L.ED.2D 340 (1981).

CONCEDING, IMPLICITLY, THE LONGSTANDING TRADITION IN THIS COMMONWEALTH THAT AN ARREST MUST BE SUPPORTED BY PROBABLE CAUSE, IT IS BEING URGED THAT THE SEIZURE IS CONSTITUTIONALLY PERMISSIBLE AND THAT THE LAW OF THIS COMMONWEALTH MUST ACCOMMODATE THIS LEGITIMATE EFFORT TO ENHANCE THE CAPABILITIES OF LAW ENFORCEMENT TO DETER, TO FERRET OUT AND TO PUNISH THOSE WHO WOULD DISREGARD OUR LAWS. WE ARE SATISFIED THAT THE CONSTITUTIONAL VALIDITY OF THE INSTANT SEIZURE IS AT BEST DUBIOUS AND THAT IT DOES NOT WARRANT A DEPARTURE FROM THE LONGSTANDING TRADITION THAT AN ARREST MUST BE SUPPORTED BY PROBABLE CAUSE.

TRADITIONALLY, IT WAS ACCEPTED THAT SEIZURES OF THE PERSON WERE REQUIRED BY THE FOURTH AMENDMENT TO BE BASED UPON PROBABLE

CAUSE. THIS PRINCIPLE WAS FOLLOWED WITHOUT EXCEPTION. GEISTEIN V. PUGH, 420 U.S. 103 (1975); BECK V. OHIO, 379 U.S. 89 (1964); HENRY V. UNITED STATES, 361 U.S. 98 (1959); JOHNSON V. UNITED STATES, 333 U.S. 10 (1947); UNITED STATES V. DI RE, 333 U.S. 581 (1947); CARROLL V. UNITED STATES, 267 U.S. 132 (1924). SEE ALSO, UNITED STATES EX REL. WRIGHT V. CUYLER, 563 F.2D 627 (3D CIR. 1977); UNITED STATES V. EMBRY, 546 F.2D 552 (3D CIR. 1976).

> THE "LONG-PREVAILING STANDARDS" OF PROBABLE CAUSE EMBODIED "THE BEST COMPROMISE THAT HAS BEEN FOUND FOR ACCOMMODATING [THE] OFTEN OPPOSING INTERESTS" IN "SAFEGUARD[ING] CITIZENS FROM RASH AND UNREASONABLE INTERFERENCES WITH PRIVACY" AND IN "SEEK[ING] TO GIVE FAIR LEEWAY FOR ENFORCING THE LAW IN THE COMMUNITY'S PROTECTION." BRINEGAR V UNITED STATES, 338 US 160, 176, 93 L ED 1879, 69 S. CT 1302 (1949). THE STANDARD OF PROBABLE CAUSE THUS REPRESENTED THE ACCUMULATED WISDOM OF PRECEDENT AND EXPERIENCE AS TO THE MINIMUM JUSTIFICATION NECESSARY TO MAKE THE KIND OF INTRUSION INVOLVED IN AN ARREST "REASONABLE" UNDER THE FOURTH AMENDMENT. THE STANDARD APPLIED TO ALL ARRESTS, WITHOUT THE NEED TO "BALANCE" THE INTERESTS AND CIRCUMSTANCES INVOLVED IN PARTICULAR SITUATIONS. CF. CAMARA V MUNICIPAL SOURT [SIC], 387 US 523, 18 L ED 930, 87 S CT 1727 (1967).
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> DUNAWAY V. NEW YORK, 442 U.S. 200, 208 (1979).

THE FIRST RECOGNITION THAT THE FOURTH AMENDMENT REASONABLENESS REQUIREMENT COULD BE SATISFIED BY A SHOWING OF SOMETHING LESS THAN PROBABLE CAUSE WAS ANNOUNCED BY THE UNITED STATES SUPREME COURT IN TERRY V. OHIO, 392 U.S. 1 (1963). THE TERRY DECISION AND ITS PROGENY(4) STATED "THAT SOME SEIZURES ADMITTEDLY COVERED BY THE FOURTH AMENDMENT CONSTITUTE SUCH LIMITED INTRUSIONS ON THE PERSONAL SECURITY OF THOSE DETAINED AND ARE JUSTIFIED BY SUCH

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(4) SEE MICHIGAN V. SUMMERS, ___ U.S. ___ (1931); PENNA. V. MIMMS, 434 U.S. 106 (1977); U.S. V. BRIGNONI-PONCE, 422 U.S. 873 (1975); ADAMS V. WILLIAMS, 407 U.S. 143 (1972).

SUBSTANTIAL LAW ENFORCEMENT INTERESTS THAT THEY MAY BE MADE ON LESS THAN PROBABLE CAUSE, SO LONG AS POLICE HAVE AN ARTICUABLE [SIC] BASIS FOR SUSPECTING CRIMINAL ACTIVITY." MICHIGAN V. SUMMERS, SUPRA AT ___, 69 L.ED.2D AT 348.

HOWEVER, THE COURT HAS ADMONISHED US TO BE MINDFUL THAT THE TERRY PRINCIPLE IS AN EXCEPTION TO THE GENERAL RULE REQUIRING PROBABLE CAUSE AND MUST NOT BE EXTENDED IN SUCH A FASHION AS TO SWALLOW THE RULE. DUNAWAY V. NEW YORK, SUPRA. IN DUNAWAY THE COURT STRESSED THE IMPORTANCE OF THE GENERAL RULE REQUIRING PROBABLE CAUSE TO SATISFY THE REASONABLENESS TEST OF THE FOURTH AMENDMENT.

> THE CENTRAL IMPORTANCE OF THE PROBABLE-CAUSE REQUIREMENT TO THE PROTECTION OF A CITIZEN'S PRIVACY AFFORDED BY THE FOURTH AMENDMENT'S GUARANTEES CANNOT BE COMPROMISED IN THIS FASHION. "THE REQUIREMENT OF PROBABLE CAUSE HAS ROOTS THAT ARE DEEP IN OUR HISTORY." HENRY V UNITED STATES, 361 US 98, 100, 4 L ED 2D 134, 80 S CT 168 (1959). HOSTILITY TO SEIZURES BASED ON MERE SUSPICION WAS A PRIME MOTIVATION FOR THE ADOPTION OF THE FOURTH AMENDMENT, AND DECISIONS IMMEDIATELY AFTER ITS ADOPTION AFFIRMED THAT 'COMMON RUMOR OR REPORT, SUSPICION, OR EVEN 'STRONG REASON TO SUSPECT' WAS NOT ADEQUATE TO SUPPORT A WARRANT FOR ARREST." ID., AT 101. (FOOTNOTES OMITTED). THE FAMILIAR THRESHOLD STANDARD OF PROBABLE CAUSE FOR FOURTH AMENDMENT SEIZURES REFLECTS THE BENEFIT OF EXTENSIVE EXPERIENCE ACCOMMODATING THE FACTORS RELEVANT TO THE "REASONABLENESS" REQUIREMENT OF THE FOURTH AMENDMENT, AND PROVIDES THE RELATIVE SIMPLICITY AND CLARITY NECESSARY TO THE IMPLEMENTATION OF A WORKABLE RULE. SEE BRINEGAR V UNITED STATES, SUPRA, AT 175-176, 93 L ED 1879, 69 S CT 1302.
>
> ID. AT 213.

IN ITS ANALYSIS IN THIS CASE THE COMMONWEALTH STRESSES THE UTILITY TO CRIMINAL INVESTIGATIONS THAT IS PROVIDED BY THESE SEIZURES WITHOUT THE NEED FOR ESTABLISHING PROBABLE CAUSE. THIS IGNORES THE CLEARLY DEFINED TEST FOR ASCERTAINING THE APPLICABILITY OF THE PROBABLE CAUSE REQUIREMENT. "...[I]N ORDER TO DECIDE

WHETHER. . .[A] CASE IS CONTROLLED BY THE GENERAL RULE, IT IS NECESSARY TO EXAMINE BOTH THE CHARACTER OF THE OFFICIAL INTRUSION AND ITS JUSTIFICATION." (EMPHASIS ADDED.) MICHIGAN V. SUMMERS, SUPRA AT ___, 69 L.ED. AT 348-49. USING THE PROPER ANALYSIS WE CANNOT CONCLUDE THAT THE INSTANT SEIZURE IS SO CLEARLY WITHIN THE TERRY EXCEPTION AS TO WARRANT A DEVIATION IN THIS CASE FROM THIS JURISDICTION'S LONGSTANDING RULE OF ARREST BASED UPON A PROPER SHOWING OF PROBABLE CAUSE.

BECAUSE THE SEIZURE WAS INSPIRED TO SERVE INVESTIGATIVE PURPOSES RATHER THAN TO ARREST AND CHARGE THE SUSPECT DOES NOT, BY THAT FACT ALONE, JUSTIFY APPLICATION OF THE TERRY EXCEPTION. DUNAWAY V. NEW YORK, SUPRA.

> [T]O ARGUE THAT THE FOURTH AMENDMENT DOES NOT APPLY TO THE INVESTIGATORY STAGE IS FUNDAMENTALLY TO MISCONCEIVE THE PURPOSES OF THE FOURTH AMENDMENT. INVESTIGATORY SEIZURES WOULD SUBJECT UNLIMITED NUMBERS OF INNOCENT PERSONS TO THE HARASSMENT AND IGNOMINY INCIDENT TO INVOLUNTARY DETENTION. NOTHING IS MORE CLEAR THAN THAT THE FOURTH AMENDMENT WAS MEANT TO PREVENT WHOLESALE INTRUSIONS UPON THE PERSONAL SECURITY OF OUR CITIZENRY, WHETHER THESE INTRUSIONS BE TERMED 'ARRESTS' OR 'INVESTIGATORY DETENTIONS.'
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> DAVIS V. MISSISSIPPI, 394 U.S. 721, 726-27 (1969).

A SIMILAR ARGUMENT WAS AGAIN REJECTED IN DUNAWAY WHERE THAT COURT OBSERVED:

> IN EFFECT, RESPONDENT URGES US TO ADOPT A MULTIFACTOR BALANCING TEST OF "REASONABLE POLICE CONDUCT UNDER THE CIRCUMSTANCES" TO COVER ALL SEIZURES THAT DO NOT AMOUNT TO TECHNICAL ARRESTS. BUT THE PROTECTIONS INTENDED BY THE FRAMERS COULD ALL TOO EASILY DISAPPEAR IN THE CONSIDERATION AND BALANCING OF THE MULTIFARIOUS CIRCUMSTANCES PRESENTED BY DIFFERENT CASES, ESPECIALLY WHEN THAT BALANCING MAY BE DONE IN THE FIRST INSTANCE BY POLICE OFFICERS ENGAGED IN THE "OFTEN COMPETITIVE ENTERPRISE OF FERRETING OUT CRIME." [CITATIONS OMITTED.] A SINGLE FAMILIAR STANDARD IS ESSENTIAL TO

> GUIDE POLICE, WHO HAVE ONLY LIMITED TIME AND EXPERTISE TO REFLECT ON AND BALANCE THE SOCIAL AND INDIVIDUAL INTERESTS INVOLVED IN THE SPECIFIC CIRCUMSTANCES THEY CONFRONT. INDEED, OUR RECOGNITION OF THESE DANGERS, AND OUR CONSEQUENT RELUCTANCE TO DEPART FROM THE PROVED PROTECTIONS AFFORDED BY THE GENERAL RULE, ARE REFLECTED IN THE NARROW LIMITATIONS EMPHASIZED IN THE CASES EMPLOYING THE BALANCING TEST. [FOOTNOTES OMITTED.]
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> Id. AT 213-214.

THE TERRY EXCEPTION HAS BEEN MOST FREQUENTLY APPLIED IN INSTANCES INVOLVING MERELY AN INVOLUNTARY DETENTION, SEE, E.G. COMMONWEALTH V. ANDERSON, 481 PA. 292, 392 A.2D 1293 (1973); COMMONWEALTH V. JONES, 474 PA. 364, 378 A.2D 835 (1977); COMMONWEALTH V. MIMMS, 471 PA. 546, 370 A.2D 1157 (1977); COMMONWEALTH V. BAILEY, 460 PA. 493, 333 A.2D 383 (1975); COMMONWEALTH V. RICHARDS, SUPRA; COMMONWEALTH V. POLLARD, 450 PA. 133, 299 A.2D 233 (1973); BETRAND APPEAL, 451 PA. 381, 303 A.2D 436 (1973); COMMONWEALTH V. GARVIN, 448 PA. 253, 293 A.2D 33 (1972); COMMONWEALTH V. HICKS, 434 PA. 153, 253 A.2D 276 (1969). HERE WE HAVE THE ADDED ELEMENT OF A TRANSPORTATION OF THE SUSPECTS FROM THE PLACE OF THE INITIAL ENCOUNTER WITHOUT EXIGENT CIRCUMSTANCES TO SUPPORT THAT ACTION. THE POLICE HAD THE OPTION OF DETAINING THE SUSPECTS AT THE SITE OF THE INITIAL ENCOUNTER AND EITHER BRINGING THE COMPLAINANT TO THE SITE FOR HIS IDENTIFICATION OF THE QUESTIONED ARTICLES OR TAKING THOSE ITEMS TO HIM. EITHER SITUATION WOULD PRESENT A MUCH STRONGER CASE FOR THE POSITION THE COMMONWEALTH FRESENTLY URGES. THE COMMONWEALTH STRESSES THE LIMITED AREA TRAVERSED IN THE TRANSPORTATION OF APPELLANT. THIS FACT ONLY HIGHLIGHTS THE EASE WITH WHICH THE IDENTIFICATION COULD HAVE BEEN MADE WITHOUT THE MOVEMENT OF THE SUSPECTS, WHICH INCREASED THE INTRUSIVENESS OF THE ENCOUNTER. THE INSTANT FACTUAL SITUATION IS ALSO ILLUSTRATIVE OF THE UNCERTANTIES ATTENDANT TO ANY ATTEMPT TO EXPAND THE TERRY EXCEPTION AND

REINFORCES THE WISDOM OF SCRUPUOUSLY [SIC] ADHERING TO THE NARROW SCOPE OF THE EXCEPTION. DUNAWAY V. NEW YORK, SUPRA.

CONSEQUENTLY, WE MUST CONCLUDE THAT THE CONSTITUTIONAL VALIDITY OF THE SEIZURE OF THE PERSON OF APPELLANT IN THIS CASE IS AT BEST DUBIOUS. SINCE THE SEIZURE UNQUESTIONABLY CONSTITUTED AN ARREST AS DEFINED IN THIS JURISDICTION WHICH REQUIRES PROBABLE CAUSE, WE ARE NOT PERSUADED THAT WE SHOULD, ON THIS RECORD, DEPART FROM THAT LONGSTANDING RESPECTED PRECEDENT. ACCORDINGLY, WE HOLD THAT THE SEIZURE OF APPELLANT WITHOUT PROBABLE CAUSE CONSTITUTED AN ILLEGAL ARREST AND THAT THE IDENTIFICATION OF THE HAT DURING THAT ILLEGAL SEIZURE SHOULD HAVE BEEN SUPPRESSED.

THE JUDGMENT OF SENTENCE IS REVERSED AND A NEW TRIAL AWARDED.

MR. JUSTICE ROBERTS FILED A CONCURRING OPINION.

MR. JUSTICE FLAHERTY JOINED IN THIS OPINION AND THE CONCURRING OPINION OF MR. JUSTICE ROBERTS.

MR. JUSTICE MCDERMOTT FILED A DISSENTING OPINION.

[J-122]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 497 January Term, 1979
	:	
	:	Appeal from the Order of the Superior Court, at October Term 1977, No. 2366, affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
v.	:	
	:	
	:	
	:	
ANDRE LOVETTE,	:	
	:	
APPELLANT	:	ARGUED: April 15, 1982

CONCURRING OPINION

ROBERTS, J. FILED: October 5, 1982

I agree that the seizure of appellant and the admission into evidence of the fruits of that unlawful arrest constitute a manifest violation of appellant's Fourth Amendment rights. Indeed, the Commonwealth concedes that appellant was seized without probable cause.

Where, as here, the police restrain a person's freedom of action beyond the period of time required to effectuate a Terry stop and without probable cause to arrest, it is of no constitutional significance whether that restraint is accomplished by detaining the person where he is initially encountered or by transporting the person to another location. In both circumstances, there is an unlawful arrest, a violation of the Fourth Amendment.

Mr. Justice Flaherty joins in this Concurring Opinion.

[J-122]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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	:	Appeal from the Order of the Superior Court, at October Term 1977, No. 2366, affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at December Term, 1976, No. 1673.
vs	:	
	:	
	:	
ANDRE LOVETTE,	:	
	:	
Appellant	:	Argued: April 15, 1982

DISSENTING OPINION

MR. JUSTICE McDERMOTT Filed: October 5, 1982

I DISSENT.

STRIPPED TO ITS ESSENTIALS, THE MAJORITY HOLDS OR SEEMS TO HOLD THAT, HAD THE POLICE BROUGHT THE COMPLAINANT TO THE SUSPECTS AND NOT THE SUSPECTS TO THE COMPLAINANT, THE RESULT WOULD BE DIFFERENT. SEE SLIP UP. AT 13. THE DISTANCE TRAVELLED IN EITHER INSTANCE WAS AT MOST A BLOCK AND A HALF. THAT A BLOCK AND A HALF MIGHT SWALLOW THE "TERRY EXCEPTION" IS THE TYPE OF FINICKY PRECIOUSNESS THAT HAS SOLIDIFIED OUR REPUTATION FOR UNREALITY.[1]

I WOULD AFFIRM THE ORDER OF THE SUPERIOR COURT.[2]

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1. SEE TERRY VS OHIO, 392 U.S. 1 (1968).

2. I NOTE IN PASSING THAT APPELLANT WILL BE UNABLE TO ENJOY THE LARGESSE OF THE COURT IN AWARDING HIM A NEW TRIAL BECAUSE HE DIED NEARLY TWO YEARS PRIOR TO THE ARGUMENT IN THIS CASE. THAT APPELLANT'S COUNSEL NEVER BOTHERED TO INFORM THE COURT OF THIS FACT, DEMONSTRATES EITHER A CYNICAL DISREGARD FOR THE CLIENT'S PARTICIPATION IN THE APPEAL PROCESS OR A SHOCKING ATTEMPT TO DECEIVE THIS COURT. IN EITHER EVENT, COUNSEL'S FAILURE TO NOTIFY THE COUR~ OF APPELLANT'S DEATH BRINGS TO LIGHT A SINISTER AND RAPIDLY EXPANDING SIDE OF THE CRIMINAL JUSTICE SYSTEM, IN WHICH LAWYERS PARADE ABOUT AND ARGUE AND DELAY FOR THEIR OWN BENEFIT, WHILE TRUTH AND FAIRNESS, AND EVEN THE CLIENTS' INTERESTS, ARE FORGOTTEN.

J. 776/78

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 2366 October Term, 1977
ANDRE LOVETTE, APPELLANT	:	PHILADELPHIA DISTRICT

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Imposed on Information No. 1673, December Session, 1976.

Before JACOBS, P.J., HOFFMAN, CERCONE, PRICE, VAN DER VOORT, SPAETH, AND HESTER, JJ.

OPINION BY CERCONE, P.J.: FILED: August 24, 1979

Appellant was convicted of burglary, theft and receiving stolen property and sentenced to four to twenty-three months imprisonment. Appellant seeks in the alternative that his judgment of sentence be arrested or that he be granted a new trial.

Appellant's first argument is that his arrest was constitutionally infirm because the police lacked probable cause to arrest him. Based upon the facts known at the time of arrest, we disagree. The arresting officer testified that on December 15, 1976 at 3:15 P.M. he received a radio dispatch to investigate males with stolen property in a deserted house. When the officers arrived they found stereos, Christmas gifts, clothing, pottery and other property stored in the vacant building. Across the driveway from the empty house, the police saw a broken rear door to a house which they discovered had been burglarized. The owner of the burglarized house later identified the goods found in the abandoned house as being stolen from his house. In transporting the stolen property to the deserted house, the burglars

CROSSED A RAIN-SOAKED BACKYARD AND LEFT MUDDY TRAILS OF FOOTPRINTS BETWEEN THE TWO HOUSES. SHORTLY AFTER THE OWNER OF THE BURGLARIZED HOUSE ARRIVED AND IDENTIFIED HIS PROPERTY, OFFICER McCOY BEGAN TO PATROL THE AREA. APPROXIMATELY ONE AND ONE-HALF BLOCKS FROM THE CRIME, THE OFFICER OBSERVED THREE MALES STANDING ON THE CORNER WITH MUD AND DIRT ON THEIR SHOES. APPELLANT WAS HOLDING A BROWN PAPER BAG IN HIS HAND. THE OFFICER APPROACHED AND REQUESTED IDENTIFICATION, BUT THE MEN DID NOT IDENTIFY THEMSELVES. WHEN ASKED HOW HIS SHOES HAD BECOME MUDDY, APPELLANT HESITATED AND REPLIED THAT HE HAD PROBABLY WALKED THROUGH DIRT OR A FIELD IN THE COURSE OF A DAY. THE OFFICER THOUGHT THE ANSWER EVASIVE. WHEN OFFICER McCOY INQUIRED INTO THE CONTENTS OF THE PAPER BAG, APPELLANT SHOWED THE OFFICER A CAMEL-HAIR COLORED HAT AND RESPONDED THAT HE JUST GOT IT FROM A FRIEND OF HIS. OFFICER McCOY THEN DECIDED TO TRANSPORT THE TRIO ONE AND ONE-HALF BLOCKS TO SEE IF THE BURGLARY VICTIM COULD IDENTIFY THE HAT. BEFORE PLACING THE GROUP IN THE POLICE WAGON, THE OFFICER CONDUCTED A "PAT-DOWN" SEARCH WHICH REVEALED THAT ONE OF APPELLANT'S COMPANIONS POSSESSED A RING AND A SILVER DIME WITH NUMISMATIC VALUE. THE COMPLAINANT IDENTIFIED ALL THREE ITEMS AS BEING TAKEN FROM HIS HOUSE. ALL THREE MEN WERE THEN ARRESTED AND TAKEN TO THE POLICE STATION.

APPELLANT DOES NOT ACTIVELY CONTEND THAT THE POLICE OFFICER WAS NOT PERMITTED TO STOP AND DETAIN HIM BRIEFLY FOR IDENTIFICATION. NOR DOES APPELLANT ASSERT THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST HIM ONCE THE HAT HAD BEEN IDENTIFIED. RATHER HE CONTENDS THAT PROBABLE CAUSE WAS LACKING WHEN THE OFFICER DROVE APPELLANT TO THE BURGLARIZED HOUSE. APPELLANT IDENTIFIES THE OFFICER'S PLACING HIM IN THE PATROL WAGON AS THE TIME OF THE ARREST, BECAUSE HE WAS SUBJECT TO THE CONTROL OF THE OFFICER.

WHILE WE ACCEPT THAT APPELLANT WAS REQUIRED TO ACCOMPANY THE OFFICER FOR THE ONE AND ONE-HALF BLOCK TRIP, WE DISAGREE WITH HIS CONCLUSION THAT IN ORDER TO DO SO THE POLICE WERE REQUIRED TO HAVE THE SAME QUANTUM OF PROOF NECESSARY TO SUPPORT A FULL-BLOWN ARREST. WE ARE NOT FACED WITH THE ASPECTS OF SUCH AN ARREST BUT, RATHER, WITH AN IDENTIFICATION PROCEDURE BY WHICH THE OFFICER COULD DETERMINE WHETHER THERE WAS PROBABLE CAUSE TO ARREST APPELLANT AND FORMALLY CHARGE HIM WITH THE CRIMINAL OFFENSES. INSTEAD OF ARRESTING APPELLANT, THE OFFICER MADE AN INTERMEDIATE RESPONSE BY TRANSPORTING APPELLANT AND THE PROPERTY A SHORT DISTANCE FOR IDENTIFICATION. INTERMEDIATE RESPONSES PREVIOUSLY HAVE BEEN APPROVED BY THE COURTS OF THIS COMMONWEALTH. COMMONWEALTH V. LESEUER, 252 PA. SUPERIOR CT. 498 (1977); COMMONWEALTH V. HARPER, 248 PA. SUPERIOR CT. 344 (1977), AS GUIDED BY THE SUPREME COURT DECISIONS IN TERRY V. OHIO, 392 U.S. 1 (1968), AND ADAMS V. WILLIAMS, 407 U.S. 143 (1972). THE OFFICER IN THIS CASE WAS RELUCTANT TO LET APPELLANT FREE TO LEAVE AS NEITHER APPELLANT NOR HIS COMPANIONS HAD IDENTIFIED THEMSELVES; AND THE HAT, AS EVIDENCE, COULD EASILY BE DESTROYED OR CONCEALED. AT THE SAME TIME, THE OFFICER WAS RELUCTANT TO ARREST APPELLANT ON THE BASIS OF THE INFORMATION KNOWN TO HIM AT THIS TIME. RATHER THAN FORCE THE OFFICER TO CHOOSE BETWEEN SUCH OPPOSITE RESPONSES, THIS COURT SANCTIONS THE USE OF AN INTERMEDIATE RESPONSE SUCH AS THE ONE USED IN THIS CASE. SEE ALSO COMMONWEALTH V. HARPER, SUPRA. OBVIOUSLY, ONCE THE HAT HAD BEEN IDENTIFIED, THE OFFICER HAD THE REQUISITE INFORMATION TO ARREST APPELLANT. COMMONWEALTH V. JONES, 457 PA. 423, 428 (1974). ACCORDINGLY, WE FIND NO ERROR IN THE COURT'S REFUSING TO SUPPRESS EVIDENCE DEMONSTRATING THAT THE HAT HAD BEEN STOLEN.

SECONDLY, APPELLANT CONTESTS THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN HIS CONVICTION OF BURGLARY, THEFT AND RECEIVING STOLEN PROPERTY. THE STANDARD OF APPELLATE REVIEW IS CLEAR AND UNCONTESTED. "THE TEST OF SUFFICIENCY OF THE EVIDENCE IS WHETHER ACCEPTING AS TRUE ALL THE EVIDENCE, TOGETHER WITH ALL REASONABLE INFERENCES THEREFROM UPON WHICH THE [FACTFINDER] COULD PROPERLY HAVE BASED ITS VERDICT, SUCH EVIDENCE AND INFERENCES ARE SUFFICIENT IN LAW TO PROVE GUILT BEYOND A REASONABLE DOUBT." COMMONWEALTH V. GREEN, 464 PA. 557, 565 (1975); COMMONWEALTH V. HARLEY, 250 PA. SUPERIOR CT. 402 (1978). APPELLANT FRAMES HIS ARGUMENT THAT A CONVICTION CANNOT STAND "SIMPLY BECAUSE HE HAD A HAT SIMILAR TO ONE BELIEVED TAKEN IN A BURGLARY, AND WAS SEEN STANDING ON A STREET CORNER NEXT TO A MAN [LATER] FOUND TO BE IN POSSESSION OF ITEMS TAKEN IN A BURGLARY OF A NEARBY HOUSE." IF THIS WERE THE EXTENT OF THE COMMONWEALTH'S EVIDENCE, APPELLANT'S ARGUMENT WOULD BE MUCH STRONGER. ADDITIONAL CIRCUMSTANTIAL EVIDENCE WAS PRODUCED AT TRIAL WHICH, TAKEN ALONG WITH PERMISSIBLE INFERENCES FROM SUCH EVIDENCE, SUPPLIED ANY MISSING LINK IN THE CHAIN OF THE COMMONWEALTH'S PROOF. APPELLANT WAS IN POSSESSION OF A CAMEL-HAIR COLORED HAT WHICH THE COMPLAINANT TESTIFIED WAS ALIKE IN EVERY DETAIL TO THE ONE STOLEN FROM HIS HOUSE. FURTHERMORE, THE POLICE WERE INSTRUCTED TO INVESTIGATE MALES IN A VACANT HOUSE WITH PROPERTY WHICH WAS LATER IDENTIFIED AS THAT STOLEN FROM COMPLAINANT'S HOUSE. SHORTLY THEREAFTER, APPELLANT AND HIS TWO COMPANIONS WERE FOUND IN POSSESSION OF SOME OF THE STOLEN PROPERTY ONLY ONE AND ONE-HALF BLOCKS AWAY FROM THE BURGLARIZED HOUSE. FINALLY, THE BURGLARS HAD CROSSED A MUDDY BACKYARD IN PERPETRATING THE CRIME AND APPELLANT'S SHOES WERE COVERED WITH MUD.

ALTHOUGH A CONVICTION CANNOT REST UPON MERE PRESENCE NEAR THE SCENE OF THE CRIME, COMMONWEALTH V. ROSCIOLI, 454 PA. 59 (1973), OR UPON MERE SUSPICION OR CONJECTURE, COMMONWEALTH V. BAILEY, 443 PA. 224 (1974), THE COMMONWEALTH'S BURDEN MAY BE MET ENTIRELY BY CIRCUMSTANTIAL EVIDENCE, COMMONWEALTH V. BAILEY, SUPRA, AND IT IS SUFFICIENT IF THE CIRCUMSTANCES ARE CONSISTENT WITH CRIMINAL ACTIVITY EVEN THOUGH THEY MIGHT LIKEWISE BE CONSISTENT WITH INNOCENT BEHAVIOR. COMMONWEALTH V. RAMBO, 250 PA. SUPERIOR CT. 314 (1977); COMMONWEALTH V. MOORE, 226 PA. SUPERIOR CT. 32 (1973). GIVEN THE SURROUNDING FACTS AND PERMISSIBLE INFERENCES IN THIS CASE, WE CONCLUDE THAT A FACTFINDER COULD FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF THE CRIMES CHARGED.

APPELLANT'S FINAL CONTENTION IS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ON THE BASIS OF AFTER DISCOVERED EVIDENCE. THE NEW "EVIDENCE" IS THE TESTIMONY OF THE COMPLAINANT PROVIDED DURING THE HEARING ON POST-VERDICT MOTIONS, THAT HE WAS MISTAKEN IN HIS TRIAL TESTIMONY THAT THE HAT IN APPELLANT'S POSSESSION WAS STOLEN FROM HIS HOUSE. THE COMPLAINANT EXPLAINED THAT AT TRIAL HE BELIEVED THAT HIS FRIEND, MICHAEL LEONARD, HAD LEFT THE HAT AT HIS HOUSE, BUT LATER LEARNED AFTER TRIAL THAT LEONARD HAD FOUND HIS HAT. APPARENTLY, THE WITNESS RECANTED HIS TESTIMONY AT TRIAL THAT THE HAT WAS IN HIS HOUSE ON THE DAY OF THE ROBBERY.

THE TRIAL JUDGE WHO HEARD THIS MODIFIED TESTIMONY OF THE COMPLAINANT BELIEVED IT TO BE FALSE AND REFUSED TO GRANT A NEW TRIAL. THERE WERE GOOD REASONS TO REJECT IT. FIRST, IT WAS HEARSAY BASED UPON THE ALLEGED STATEMENTS OF MICHAEL LEONARD WHOSE WHEREABOUTS WERE CURRENTLY UNKNOWN, BUT BELIEVED TO BE TEXAS. SECOND, THE TESTIMONY WAS ONLY OFFERED AFTER APPELLANT AND HIS

MOTHER PAID A VISIT TO THE COMPLAINANT'S HOME. THIRD, THE COMPLAINANT ADMITTED HAVING HEARD RUMORS IN THE NEIGHBORHOOD THAT APPELLANT DID NOT BURGLARIZE HIS HOME. FOURTH, IF THE HAT DID NOT BELONG TO MICHAEL LEONARD, AND APPELLANT'S EXPLANATION THAT IT BELONGED TO A FRIEND OF HIS WERE TRUE, WHY DID NOT APPELLANT'S FRIEND APPEAR AND TESTIFY? AND, FINALLY, AT THE HEARING THE COMPLAINANT WAS ARGUMENTATIVE WITH THE ASSISTANT DISTRICT ATTORNEY AND, IN GENERAL, CONDUCTED HIMSELF AS AN ADVOCATE FOR APPELLANT'S INNOCENCE [SIC] THAN AS A VICTIM OF A CRIME. THESE FACTORS, WHEN COUPLED WITH THE STRONG AND SURE IDENTIFICATION THE COMPLAINANT PROVIDED FOR THE HAT AT TRIAL, AND HIS UNSHAKEABLE CERTITUDE THAT THE HAT WAS IN HIS HOUSE ON THE DAY OF THE BURGLARY, PROVIDE AMPLE BASIS FOR THE COURT BELOW TO REFUSE TO GRANT A NEW TRIAL. BECAUSE "RECANTING TESTIMONY IS EXTREMELY UNRELIABLE, IT IS THE DUTY OF THE COURT TO DENY A NEW TRIAL WHERE IT IS NOT SATISFIED THAT THE TESTIMONY IS TRUE." COMMONWEALTH V. COLEMAN, 438 PA. 373, 377 (1970). AND, ON APPEAL, WE MAY NOT INTERFERE WITH THE TRIAL COURT'S EVALUATION OF THE TESTIMONY UNLESS THERE HAS BEEN A CLEAR ABUSE OF DISCRETION. COMMONWEALTH V. ANDERSON, 466 PA. 339 (1976); COMMONWEALTH V. COLEMAN, SUPRA. BASED UPON THE FOREGOING, WE CAN FIND NO ABUSE OF DISCRETION IN THE COURT'S REJECTING THE RECANTING TESTIMONY.

JUDGMENT OF SENTENCE AFFIRMED.

SPAETH, J. FILES A DISSENTING OPINION IN WHICH HOFFMAN, J. JOINS. JACOBS, FORMER P.J. DID NOT PARTICIPATE IN THE CONSIDERATATION OR DECISION OF THIS CASE.

J. 776/78

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF PENNSYLVANIA

v. : PHILADELPHIA DISTRICT

ANDRE LOVETTE,

APPELLANT : No. 2366 OCTOBER TERM 1977

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS OF PHILA. COUNTY, TRIAL DIV., CRIMINAL SECT., IMPOSED ON INFORMATION NO. 1673 DECEMBER SESSION 1976.

EN BANC

BEFORE JACOBS, P.J., HOFFMAN, CERCONE, PRICE, VAN DER VOORT, SPAETH AND HESTER, JJ.

DISSENTING OPINION BY SPAETH, J.: FILED: AUGUST 24, 1979

THE MAJORITY HOLDS THAT THE POLICE, BY PUTTING APPELLANT INTO THE POLICE WAGON AND TRANSPORTING HIM TO THE SCENE OF THE BURGLARY, DID NOT "ARREST" HIM, BUT INSTEAD CARRIED OUT A PERMISSIBLE "INTERMEDIATE RESPONSE", SHORT OF A FULL ARREST. SLIP OP. AT 3. THIS HOLDING, I SUBMIT, IS INCORRECT UNDER A NUMBER OF DECISIONS, WHICH JUDGE HESTER COLLECTED AND STATED IN COMMONWEALTH V. GRAY, ___ PA. SUPERIOR CT. ___, ___ A.2D ___ (FILED JANUARY 18, 1979). IN GRAY, POLICE WERE GIVEN A DESCRIPTION OF ROBBERS AND STOPPED FOUR INDIVIDUALS, PUT THEM INTO THE POLICE VAN, AND DROVE BACK TO THE SCENE OF THE ROBBERY. JUDGE HESTER SAID:

> NOR DO WE HAVE ANY TROUBLE DECIDING THAT PLACING APPELLANT IN THE POLICE WAGON CONSTITUTED A FULL BLOWN ARREST. SEE, COMMONWEALTH V. HOLMES, ___ PA. ___ (FILED 10/5/78) (DEFENDANT ARRESTED WHEN ESCORTED TO A ROOM BY A POLICE OFFICER AND LOCKED THEREIN); COMMONWEALTH V. ROSCIOLA, 240 PA. S. 135, 361 A.2D 834 (1976) (DEFENDANT ARRESTED WHEN HANDCUFFED); COMMONWEALTH V. KLOCH, 230 PA. S. 563, 327 A.2D 375 (1974) (DEFENDANT ARRESTED WHEN

> PLACED IN TROOPER'S PATROL CAR); COMMONWEALTH V. DOSURGI, 411 PA. 56, 190 A.2D 304 (1963): "AN ARREST MAY BE ACCOMPLISHED BY 'ANY ACT THAT INDICATES AN INTENTION TO TAKE [A PERSON] INTO CUSTODY AND SUBJECTS HIM TO THE ACTUAL CONTROL AND WILL OF THE PERSON MAKING THE ARREST.'" ID. AT ___, 190 A.2D AT 311.
>
> COMMONWEALTH V. GRAY, SUPRA, SLIP OP. AT 2-3, N. 1.

SEE ALSO, COMMONWEALTH V. NORTON, 475 PA. 374, 330 A.2D 769 (1977) (ARREST OCCURRED WHEN POLICE HANDCUFFED DEFENDANT AND GAVE HIM NO INDICATION HE COULD LEAVE POLICE BUILDING). IN LIGHT OF THESE CASES, IT CANNOT BE SERIOUSLY CONTENDED THAT THE POLICE DID NOT ARREST APPELLANT, EVEN THOUGH THE DISTANCE THEY TRANSPORTED HIM WAS A SHORT ONE.

THE CORRECTNESS OF THESE PENNSYLVANIA CASES WAS RECENTLY UNDERSCORED BY THE SUPREME COURT OF THE UNITED STATES IN DUNAWAY V. NEW YORK, 25 CR.L. 3127 (JUNE 5, 1979). THERE, ACTING ON A TIP THAT DID NOT AMOUNT TO PROBABLE CAUSE TO ARREST, THE POLICE "PICKED UP" A SUSPECT AND TOOK HIM TO THE STATION HOUSE FOR INTERROGATION. THE POLICE ADMITTED THAT THE SUSPECT WAS NOT FREE TO LEAVE (AS, HERE, THE MAJORITY "ACCEPT[S] THAT APPELLANT WAS REQUIRED TO ACCOMPANY THE OFFICER FOR THE ONE AND ONE-HALF BLOCK TRIP," SLIP OP. AT 3), BUT ARGUED FOR JUST THE SORT OF INTERMEDIATE RESPONSE (OR "BALANCING TEST", DUNAWAY V. NEW YORK, SUPRA AT 3131) THAT THE COMMONWEALTH URGES HERE. THE SUPREME COURT REJECTED THAT ARGUMENT:

> THE FOURTH AMENDMENT, APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, MAPP V. OHIO, 367 U.S. 643, 81 S. CT. 1684, 6 L.ED. 2D 1081 (1961) PROVIDES: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS . . . AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE BUT UPON 'PROBABLE CAUSE. . . .' THERE CAN BE LITTLE DOUBT THAT PETITIONER WAS "SEIZED" IN THE FOURTH AMENDMENT SENSE WHEN

> HE WAS TAKEN INVOLUNTARILY TO THE POLICE STATION. AND RESPONDENT STATE CONCEDES THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST PETITIONER BEFORE HIS INCRIMINATING STATEMENT DURING INTERROGATION. NEVERTHELESS RESPONDENT CONTENDS THAT THE SEIZURE OF PETITIONER DID NOT AMOUNT TO AN ARREST AND WAS THEREFORE PERMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE THE POLICE HAD A "REASONABLE SUSPICION" THAT PETITIONER POSSESSED "INTIMATE KNOWLEDGE ABOUT A SERIOUS AND UNSOLVED CRIME." BRIEF FOR RESPONDENT AT 10. WE DISAGREE.
>
> Id. AT 3129 (FOOTNOTES OMITTED).

THE COURT REFUSED TO EXTEND TERRY V. OHIO, 392 U.S. 1 (1968), AND ADAMS V. WILLIAMS, 407 U.S. 143 (1972) (UPON WHICH THE MAJORITY RELIES). THE NATURE OF THE INTRUSION IN THOSE CASES, THE COURT SAID, WAS MUCH LESS OFFENSIVE THAN THE INTRUSION FORCED UPON THE DEFENDANT IN DUNAWAY. INDEED, IN NEITHER TERRY NOR ADAMS WAS THERE A TRANSPORTING OF THE DEFENDANTS AWAY FROM THE SPOT WHERE THEY WERE FOUND:

> IN CONTRAST TO THE BRIEF AND NARROWLY CIRCUMSCRIBED INTRUSIONS INVOLVED IN THOSE CASES, THE DETENTION OF PETITIONER WAS IN IMPORTANT RESPECTS INDISTINGUISHABLE FROM A TRADITIONAL ARREST. PETITIONER WAS NOT QUESTIONED BRIEFLY WHERE HE WAS FOUND. INSTEAD, HE WAS TAKEN FROM A NEIGHBOR'S HOME TO A POLICE CAR, TRANSPORTED TO A POLICE STATION, AND PLACED IN AN INTERROGATION ROOM. HE WAS NEVER INFORMED THAT HE WAS "FREE TO GO"; INDEED, HE WOULD HAVE BEEN PHYSICALLY RESTRAINED IF HE HAD REFUSED TO ACCOMPANY THE OFFICERS OR HAD TRIED TO ESCAPE THEIR CUSTODY. THE APPLICATION OF THE FOURTH AMENDMENT'S REQUIREMENT OF PROBABLE CAUSE DOES NOT DEPEND ON WHETHER AN INTRUSION OF THIS MAGNITUDE IS TERMED AN "ARREST" UNDER STATE LAW. THE MERE FACTS THAT PETITIONER WAS NOT TOLD HE WAS UNDER ARREST, WAS NOT "BOOKED," AND WOULD NOT HAVE HAD AN ARREST RECORD IF THE INTERROGATION HAD PROVED FRUITLESS, WHILE NOT INSIGNIFICANT FOR ALL PURPOSES, SEE CUPP V. MURPHY, 412 U.S. 291 (1973), OBVIOUSLY DO NOT MAKE PETITIONER'S SEIZURE EVEN ROUGHLY ANALOGOUS TO THE NARROWLY DEFINED INTRUSIONS INVOLVED IN TERRY AND ITS PROGENY. INDEED, ANY "EXCEPTION"

> THAT COULD COVER A SEIZURE AS INTRUSIVE AS THAT IN THIS CASE WOULD THREATEN TO SWALLOW THE GENERAL RULE THAT FOURTH AMENDMENT SEIZURES ARE "REASONABLE" ONLY IF BASED ON PROBABLE CAUSE.
>
> DUNAWAY V. NEW YORK, SUPRA, AT 3130.

THE MAJORITY FINDS SUPPORT FOR ITS "INTERMEDIATE RESPONSE" THEORY IN TWO CASES OF THIS COURT. HOWEVER, ONE, COMMONWEALTH V. LESEUER, 252 PA. SUPERIOR CT. 498, ___ A.2D ___ (1977), IS INAPPLICABLE. IN THAT CASE, THE MAJORITY HELD THAT PROBABLE CAUSE TO ARREST EXISTED. THEREFORE, THE QUESTION WE FACE HERE WAS SOLVED AT THE OUTSET. IT IS TRUE THAT IN DISSENT I ARGUED FOR WHAT MIGHT BE CALLED AN INTERMEDIATE RESPONSE, BUT I IN NO WAY INDICATED THAT SUCH A RESPONSE COULD ENCOMPASS TAKING THE DEFENDANTS AWAY. INDEED, THAT WAS PRECISELY WHAT I OBJECTED TO. INSTEAD, I ARGUED FOR EXACTLY WHAT I URGE HERE: THAT THE POLICE, INSTEAD OF TRANSPORTING SUSPECTS, USE THEIR INVESTIGATORY SKILLS AT THE SPOT WHERE THEY FIND THE SUSPECTS. HERE, THE PUTATIVE OWNER OF THE CAMEL COLORED HAT WAS ONE AND ONE-HALF BLOCKS AWAY FROM APPELLANT. THERE IS NO REASON WHY THE POLICE COULD NOT HAVE PROTECTED THEIR INVESTIGATION, AND APPELLANT'S RIGHTS TOO, BY ASKING THE OWNER TO TRAVEL THE ONE AND ONE-HALF BLOCKS TO IDENTIFY THE CAP. TERRY WOULD CERTAINLY ALLOW SUCH A BRIEF, ON-THE-SPOT DETENTION OF APPELLANT.

COMMONWEALTH V. HARPER, 248 PA. SUPERIOR CT. 344, 375 A.2D 129 (1977), PROVIDES MORE SUPPORT FOR THE MAJORITY, BUT IS READILY DISTINGUISHABLE. THERE, THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT THE PERPETRATORS OF A CRIME WERE AMONG THE PASSENGERS ON A BUS. ALL THOSE ON THE BUS WHO FIT THE DESCRIPTION WERE TAKEN TO THE HOSPITAL, WHERE THE VICTIM IDENTIFIED THE DEFENDANT. AS THE

OPINION NOTES, AT LEAST THE POLICE KNEW THEY HAD PROBABLE CAUSE TO ARREST SOMEBODY IN THE GROUP; FURTHERMORE, THE VICTIM COULD NOT COME TO THE SCENE. HERE, HOWEVER, THERE WAS NO SUCH NEATLY DESCRIBED CLASS DEFINITELY INCLUDING THE PERPETRATORS, AND THE OWNER OF THE HAT WAS READILY AVAILABLE TO COME TO THE SITE.[1]

HAVING DECIDED THAT THE POLICE ARRESTED APPELLANT, I NEXT ASK WHETHER THERE WAS PROBABLE CAUSE FOR THIS ARREST. THE POLICE WERE TOLD ONLY THAT "MALES" WERE SEEN WITH APPARENTLY STOLEN PROPERTY; FROM FOOTPRINTS IN THE MUD, THE POLICE COULD ALSO PRESUME THAT THE CULPRITS WOULD HAVE MUDDY SHOES. THEY STOPPED APPELLANT AND HIS COMPANIONS, ALTHOUGH THEY DID NOT KNOW HOW MANY MEN WERE INVOLVED, THEIR AGES, THEIR RACES, OR ANY OTHER ITEM OF DESCRIPTION. THE GROUP WAS STOPPED A BLOCK AND A HALF FROM THE SCENE OF THE CRIME, AND ABOUT 25 MINUTES AFTER THE CALL ABOUT THE "MALES" CAME OVER THE RADIO. I SUBMIT THAT NOTHING CONCLUSIVE -- OR EVEN STRONGLY PROBATIVE -- CAN BE DEDUCED FROM APPELLANT'S LOCATION IN MID-AFTERNOON IN A RESIDENTIAL AREA. THE MOST PROBATIVE FACT WAS THAT APPELLANT AND HIS TWO FRIENDS HAD MUD ON THEIR SHOES. YET THE OFFICER TESTIFIED THAT THE AREA INCLUDED MANY HOUSES WITH BACK YARDS, AND A DEMOLITION SITE THAT WOULD HAVE HAD "SOME" DIRT, N.T. SUPPRESSION HEARING AT 17, 21. APPELLANT COULD PRODUCE NO IDENTIFICATION, SEEMED "EVASIVE," AND HAD A HAT IN A BAG. THESE FACTS DO NOT AMOUNT TO PROBABLE CAUSE TO ARREST.[2] THE MAJORITY, BY ANALYZING THE ISSUE IN TERMS OF WHETHER THE POLICE

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1. I EXPRESS NO OPINION WHETHER, IN LIGHT OF DUNAWAY V. NEW YORK, SUPRA, COMMONWEALTH V. HARPER REMAINS GOOD LAW.

2. SINCE THE FRISK, WHICH YIELDED A MAN'S RING AND OLD DIME, WAS CONDUCTED INCIDENT TO THE DECISION TO LOAD THE THREE INTO THE POLICE VAN, THOSE ITEMS -- ASSUMING THEY WERE PROBATIVE -- MAY NOT BE CONSIDERED IN DETERMINING THE QUESTION OF PROBABLE CAUSE TO ARREST.

WERE PERMITTED TO TRANSPORT APPELLANT ON LESS THAN THE QUANTUM OF PROOF NECESSARY TO SUPPORT A FULL ARREST, APPARENTLY CONCEDES AS MUCH.

THE PHYSICAL EVIDENCE AND APPELLANT'S STATEMENTS BEING FRUITS OF AN UNLAWFUL ARREST, I SHOULD REVERSE THE JUDGMENT OF SENTENCE AND REMAND FOR A NEW TRIAL.

HOFFMAN, J., JOINS IN THIS DISSENTING OPINION.